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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/783,152	02/20/2004	Rafail Zubok	532/7X2	7040
51640 SPINE MP LERNER, DAVID, et al. 600 SOUTH AVENUE WEST WESTFIELD, NJ 07090	7590 10/17/2008			
EXAMINER				
PELLEGRINO, BRIAN E				
ART UNIT		PAPER NUMBER		
3738				
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10/17/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/783,152

Applicant(s)

ZUBOK ET AL.

Examiner

Brian E. Pellegrino

Art Unit

3738

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 June 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3,4,9-12,16 and 17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3,4,9-12,16 and 17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB-08)
- Paper No(s)/Mail Date 6/30/08
- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1,3,4,9-11 are rejected under 35 U.S.C. 102(e) as being anticipated by Bagga et al. (2003/125739). Figs. 26,27 show a distraction instrument **310** in the form of a plying device with at least two hinges that includes a pair of extension forks **320,330** with two tines each. It can be seen that the axis of the tines is offset from the axis of the handles. Fig. 23 shows that the extensions extend from an elongate base and includes a ridge perpendicular to the outward facing surface of the tines. This ridge forms a vertebral body stop. Regarding claim 9, the device is capable of distracting, paragraph 141. Fig. 25 shows that the extensions have a notch since they do not lie in the same plane as the base of the extension and the forks extend up and outward from the base. Figs. 4,12,15 show the perimeter surfaces of the implant are rounded and thus, the instrumentation having the fork extensions that engage the implant would be curved or have a curved profile.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bagga et al. (2003/125739) in view of Rinner et al. (6551316). Bagga et al. is explained supra. However, Bagga does not disclose the fork shape extensions are releasable. Rinner et al. teach (Fig. 1) a distraction instrument in the form of a plying device with detachable fork shaped extensions **13,14**. Rinner also teaches that the versatility of the releasable components gives the surgeon advantageous delivery precision, col. 1, lines 39-44. It would have been obvious to one of ordinary skill in the art to use releasable end extensions as taught by Rinner et al. with the plying distractor of Bagga et al. such that it provides the surgeon with the necessary capabilities in delivering an implant to a delicate location such as between the vertebrae.

Claims 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bagga et al. (2003/125739) in view of Aebi et al. (6261296). Bagga et al. is explained supra. However, Bagga does not disclose the system used with a spinal implant having two baseplates. Aebi et al. teach (Fig. 3) a distraction instrument in the form of a plying device with fork shaped extensions. Aebi also shows that the implant to be inserted with the instrument is a spinal device with upper and lower baseplates, Fig. 5. It would have been obvious to one of ordinary skill in the art to use distraction device with fork shaped extensions also with a spinal implant with baseplates as taught by Aebi et al. using the

plying distractor of Bagga et al. such that it provides the surgeon with the necessary capabilities and provides the proper implant to suit the patient's needs.

Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bagga et al. (2003/125739) in view of Aebi et al. (6261296) as applied to claim 16 above, and further in view of Buttner-Janz et al. (5401269). Bagga in view of Aebi et al. is explained above. It is noted that both Bagga and Aebi does disclose teeth on the implant, see Figures. However, Bagga as modified by Aebi fail to disclose teeth spaced apart from a centrally disposed dome. Buttner-Janz teaches (Figs. 3,4) a centrally disposed dome between the plates and teeth spaced apart towards the perimeter of the plates and on the exterior surface such that they are apart from the dome. It would have been obvious to one of ordinary skill in the art to incorporate the teeth as placed on the exterior surface of the plates taught by Buttner-Janz in substitution of the teeth of Bagga as modified by Aebi et al. implant and incorporate an articulating dome centrally within the plates as taught by Buttner-Janz for the device of Bagga in view of Aebi such that it allows the device to permit articulation in a patient not requiring fusion.

Response to Arguments

Applicant's arguments with respect to claims 1,16 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E. Pellegrino whose telephone number is 571-272-4756. The examiner can normally be reached on M- F (9am-5:30pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3738

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

TC 3700
/Brian E Pellegrino/
Primary Examiner, Art Unit 3738